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PTO/SB/21 (09-04)
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5

Application Number	10/735,144
Filing Date	12/12/2003
First Named Inventor	Michael J. Shebek
Art Unit	3751
Examiner Name	Robert M. Fetsuga
Total Number of Pages in This Submission	5
Attorney Docket Number	APC-P0002-01

ENCLOSURES (Check all that apply)

<input type="checkbox"/> Fee Transmittal Form	<input type="checkbox"/> Drawing(s)	<input type="checkbox"/> After Allowance Communication to TC
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SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	Baker & Daniels LLP		
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Printed name	Kevin R. Erdman		
Date	May 15, 2006	Reg. No.	33,687

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No.: : 10/735,144 Confirmation No.: 1570
Applicant: : Michael J. Shebek
Filed: : December 12, 2003
Art Unit: : 3751
Examiner: : Robert M. Fetsuga

Docket No.: : APC-P0002-01
Customer No.: : 27268

RESPONSE

Mail Stop Amendment
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This is responsive to the Office Action dated February 14, 2006. Applicant submits the following Response. Applicant thanks the Examiner for no longer pursuing the drawing objection.

Responsive to rejection of claims 1 and 6-11 under 35 U.S.C. § 112, first paragraph, applicant has submitted the Declaration of Bruce Holmes (hereinafter “the Declaration”). The Declaration sets forth Mr. Holmes’ qualifications as an expert in the level of ordinary skill in the art, and the Examiner has disregarded the Declaration in maintaining this rejection. In the Declaration, Mr. Holmes explicitly refuted this rejection in the final sentence of paragraph 3:

Accordingly, it is my opinion that an artisan of ordinary skill in the pool equipment installation industry would recognize that the invention of the above-identified patent application could be implemented with or without an insert plate.

Rebuttal evidence and arguments can be presented by way of an affidavit or declaration under 37 CFR 1.132. MPEP § 2144.08 II. B. Rebuttal evidence may include evidence of the state of the art, the level of skill in the art, and the beliefs of those skilled in the art. MPEP § 2144.08 II. B. The Examiner should consider all rebuttal arguments and evidence presented by

applicants. MPEP § 2144.08 II. B. “[I]t is illogical for the Board, without reason, to accept as true only that part of Soni’s statement which supports the PTO’s theory of unpatentability, while rejecting the remainder of the statement.” MPEP § 2144.08 II. B. citing *In re Soni*, 54 F.3d 746, 750 (Fed. Cir. 1995). The Court has held that “the nature of the matter sought to be established, as well as the strength of the opposing evidence, must be taken into consideration in assessing the probative value of expert opinion.” MPEP § 2144.08 II. B. citing *In re Oelrich*, 579 F.2d 86, 91-92 (CCPA 1978). Applicant respectfully submits that the Examiner should take the Declaration into consideration and give reasons for accepting or rejecting each piece of opposing evidence supplied by the Declaration.

Applicant thanks the Examiner for acknowledging the withdrawal of the rejection of Claim 3.

Responsive to the rejection of claims 1-17 under 35 U.S.C. § 102(a-e) as being anticipated by Last ‘990 (hereinafter “the Last ‘990 patent”), applicant has submitted the Declaration to refute the assertions of the Examiner regarding the Last ‘990 patent. Consideration of rebuttal evidence and arguments requires the Examiner to weigh the proffered evidence and arguments. MPEP § 2144.08 II. B. citing *In re Alton*, 76 F.3d 1168, 1174-75 (Fed. Cir. 1996). In *In re Alton*, the court held that the examiner’s final rejection and Answer contained two errors, the second error being “the summary dismissal of the declaration, without an adequate explanation of why the declaration failed to rebut the Board’s prima facie case of inadequate description.” *In re Alton*, 76 F.3d 1168, 1174-75 (Fed. Cir. 1996).

The Declaration regarding the C channels related to the disclosure of the Last ‘990 patent. The claims of the present application do not require C channels having different configurations, rather they require channels having different configurations. Therefore, the Declaration should be given probative value regarding the lack of any disclosure, teaching, or suggestion that the Last ‘990 patent anticipates or renders obvious the claims of the present invention. In the Declaration, Mr. Holmes explicitly stated that the Last '990 disclosure would

not lead an artisan to making channels with different configurations, and noted in the third sentence of paragraph 5:

The noted portion of the disclosure of the Last Patent does teach that the extruded longitudinal track does not necessarily require a C channel configuration, but it is my opinion that the Last Patent contains no teaching or suggestion that the opposite channels would be anything other than an identical or mirror image of each other.

The Last '990 patent explicitly notes the advantages of a symmetrical configuration. The disclosure of Last teaches that symmetrical configuration can be in a variety of shapes. However, Last contains no disclosure teaching or suggestion that the configuration of the channels be anything other than symmetrical for the purpose of accommodating two different configurations of rope arrangements. However, that is precisely what the present invention claims. Mr. Holmes' Declaration notes that there is no teaching or suggestion that the channels have a different shape to accommodate different rope systems, and the Examiner has shown no explicit disclosure of such. The Examiner maintains that one of ordinary skill would understand the Last '990 disclosure to inherently include such a configuration, yet one of ordinary skill in the art has refuted the Examiner's position. Accordingly, reversal of the Examiner's rejection on this basis is respectfully requested.

Applicant thanks the Examiner for referring to MPEP § 714.02 and 608.01(o), but applicant respectfully reminds that these parts of MPEP do not substantiate the Examiner's position. MPEP § 714.02 states that in all cases where reply to a requirement is indicated as necessary for further consideration of the claims, or where allowable subject matter has been indicated in an application, a complete reply must either comply with the formal requirements or specifically traverse each one not complied with.

In the Office Action dated February 14, 2006, the Examiner: (1) withdrew objection to the drawings in paragraph 1, (2) rejected claims 1 and 6-11 under 35 U.S.C. § 112, first